

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1870-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BARRY L. BALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed in part and reversed in part.*

¶1 DYKMAN, P.J.¹ Barry L. Ball appeals from a judgment convicting him of disorderly conduct, in which the trial court ordered him to make restitution to a prison worker who was injured while attempting to break up a fight between

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

Ball and another inmate. Ball argues that the trial court improperly ordered restitution because the prison worker, Mark Hess, was not a victim of the disorderly conduct. We agree with Ball that Hess was not a victim of Ball's crime because the conduct for which Ball was convicted was not directed at Hess. We therefore reverse the judgment insofar as it requires Ball to pay restitution.

I. Background

¶2 While an inmate at Fox Lake Correctional Institution (FLCI), Ball had a fight with another inmate named Topp. Hess, a recreation leader at FLCI, arrived on the scene, found both Ball and Topp bleeding, and separated them. While Hess used a phone to call for assistance, Topp threatened Ball, so Ball picked up a stapler and threw it at Topp. Topp and Ball resumed their physical altercation, and Hess ordered Ball to stop.

¶3 At trial, Ball and Hess gave conflicting testimony as to whether Hess also attempted to physically restrain Ball. Ball testified that he did not believe that Hess ever touched him. Hess testified that he attempted to pull Ball off of Topp, and that as a result, he suffered an injury to his left shoulder. Hess also testified that he required medical treatment for the injury, and that it caused him to miss more than two weeks of work.

¶4 Based on Ball's actions after Hess arrived, the State charged Ball with disorderly conduct, and a jury found him guilty.² At the sentencing hearing, the trial court ordered Ball to pay restitution to cover the cost of Hess's medical

² The state initially charged Ball with two counts of battery, one with respect to Hess and one with respect to Topp, but then amended its complaint, charging two counts of disorderly conduct instead. The trial court eventually dismissed one of the charges.

treatment and lost wages.³ The order was incorporated into Ball's judgment of conviction, and Ball appeals the judgment.

II. Analysis

¶5 Ball argues that the trial court lacked the authority to award restitution because Hess was not a victim of his crime within the meaning of the restitution statute, WIS. STAT. § 973.20 (1997-98).⁴ The State contends that the trial court's decision to award restitution is a discretionary one and that the court properly exercised its discretion when it determined that Hess was a victim of Ball's disorderly conduct. We agree with Ball.

¶6 The determination of restitution is within the discretion of the trial court, subject to WIS. STAT. § 973.20. *State v. Kennedy*, 190 Wis. 2d 252, 259, 528 N.W.2d 9 (Ct. App. 1994). However, the interpretation and application of § 973.20, including who is a "victim" under the statute, is a question of law that we determine without deference to the trial court's conclusions. *State v. Howard-Hastings*, 218 Wis. 2d 152, 154, 579 N.W.2d 290 (Ct. App. 1998).

³ The trial court ordered that Ball pay the restitution to the Department of Administration, which apparently covered the cost of Hess's lost wages and medical bills. As the trial court correctly determined, government entities may be reimbursed as insurers of victims under WIS. STAT. § 973.20(5)(d) (1997-98). See *State v. Baker*, 2001 WI App 100, ¶13, 243 Wis. 2d 77, 626 N.W.2d 862. However, the operation of § 973.20(5)(d) does not negate the requirement that the person in the position of the insured still be a victim of the crime. Section 973.20(5)(d) states that the court may order the defendant to "reimburse any insurer, surety or other person who has compensated a victim for a loss." (Emphasis added.)

⁴ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. § 973.20 states, in part:

(1r) When imposing sentence or ordering probation for any crime for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing

¶7 WISCONSIN STAT. § 973.20 does not define the term “victim,” but we have previously addressed the question of who is a “victim” of disorderly conduct. *See State v. Vinje*, 201 Wis. 2d 98, 548 N.W.2d 118 (Ct. App. 1996). In *Vinje*, the defendant was convicted of disorderly conduct after he verbally and physically fought with his wife. *Id.* at 100, 104. We addressed the question of whether the defendant’s wife was a “victim” of his disorderly conduct for purposes of the victim intimidation statute. *Id.* at 104. We concluded that she was the victim of the disorderly conduct only because the defendant’s behavior was “directed at” her. *Id.* “The plain language of the disorderly conduct statute does not require a victim,” and “there may be cases in which there is no victim of disorderly conduct.” *Id.*

[I]f the disorderly conduct is directed at a person, then that person is the victim of disorderly conduct as a matter of fact for the purpose of prosecuting a defendant with intimidation of a victim. Thus, whether a person is a victim of disorderly conduct will proceed on a case-by-case basis for a determination of whether the disorderly conduct was directed at another person.

Id.

¶8 Even though *Vinje* was not a restitution case, the parties agree that it sets forth the standard for determining who, if anyone, is a victim of disorderly conduct. Additionally, the definition of victim set out in *Vinje* is consistent with the way we have limited the scope of the term “victim” under WIS. STAT. § 973.20. In *State v. Schmalong*, 198 Wis. 2d 756, 761 n.3, 543 N.W.2d 555 (Ct. App. 1995), we rejected as overly broad a definition of “victim” that would have included anyone “directly harmed by the defendant’s criminal conduct.” There, we addressed whether a government entity could be a “victim” for purposes of

§ 973.20 even if it was not an “actual” or “direct” victim, and we held that it could not be. *Id.* at 761; *see also Howard-Hastings*, 218 Wis. 2d at 158.

¶9 The State asserts that the trial court’s findings and references to evidence at trial support the proper exercise of its discretion with regard to its restitution determination. At Ball’s sentencing hearing, the trial court made the following determinations:

So part of the essence of this disorderly conduct was not only going after Topp after the fight was over, but also disregarding the directions and instructions of Mr.—of Mr. Hess. Mr. Hess was never the target of Mr. Ball’s violent conduct. That is, he had no intention—Mr. Ball, of hurting Mr. Hess. I’ll make that a finding of fact. But I would also make it a finding of fact that in the process of trying to get Ball off of Topp, that there was an injury suffered by Mr. Hess.

In light of *Vinje*, we do not agree that these findings can support a conclusion that Hess was a victim of Ball’s disorderly conduct. The State is correct that we do not know what evidence led the jury to convict Ball of disorderly conduct, but the jury heard no evidence that Ball fought with Hess or directed his conduct at Hess in any way. Ball’s conduct was directed at Topp, not Hess. We therefore reverse the part of the judgment ordering Ball to make restitution.

By the Court.—Judgment affirmed in part and reversed in part.

Not recommended for publication in the official reports. *See WIS. STAT. RULE 809.23(1)(b)4 (1999-2000).*

